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No. 82-118

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CROWN, CORK & SEAL COMPANY, INC.,
Petitioner,
v.
THEODORE PARKER.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether equitable tolling principles, which suspend the running of statutes of limitations for class members' individual claims during the pendency of a putative class action embracing those claims, permit class members only to intervene but not to file separate suits once class certification has been denied or revoked in that action.

TABLE OF CONTENTS

	Page
Table of Authorities	iv
Statement of the Case	1
Summary of Argument	5
ARGUMENT—	
The Pendency Of A Putative Class Action Tolls The Running Of The Statute Of Limitations For Individual Claims Of Members Of The Putative Class From The Time The Action Is Commenced Until Denial Of Class Certification	7
Introduction	7
A. The Decision Below Correctly Construes And Applies This Court's Ruling In *American* Pipe	8
1. The basis for *American Pipe*	8
2. Scope of the *American Pipe* rule	9
3. Application of *American Pipe* to this case	10
4. The language and cases on which Crown relies	13
B. Tolling the Statute Of Limitations In This Case Is Consistent With The Purposes Of Limitations Periods	17
Conclusion	21

TABLE OF AUTHORITIES

Cases: Page

American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974) ..... *passim*
Arneil v. Ramsey, 550 F.2d 774 (2d Cir. 1977) ..4n, 14-15
Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 4, 14
Haas v. Pittsburgh National Bank, 526 F.2d 1083 (3d Cir. 1975) 16
In re Fine Paper Litigation, 632 F.2d 1081 (3d Cir. 1980) 16
Jiminez v. Weinberger, 523 F.2d 689 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976) 16
McCarthy v. Kleindienst, 562 F.2d 1269 (D.C. Cir. 1977) 19
Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944) 18
Pavlak v. Church, 681 F.2d 617 (9th Cir. 1982), petition for cert. filed, 51 U.S.L.W. 3320 (No. 82-650, Oct. 12, 1982) 16
Parker v. Crown, Cork & Seal Co., 677 F.2d 391 (4th Cir. 1982) 4, 16
Pendleton v. Crown, Cork & Seal Co., Civ. No. M-78-1734 (D. Md.) ..... *passim*
Satterwhite v. City of Greenville, 578 F.2d 987 (5th Cir. 1978), vacated, 445 U.S. 940 (1980).. 16-17
Stull v. Bayard, 561 F.2d 429 (2d Cir. 1977), cert. denied, 434 U.S. 1035 (1978) 4n, 15-16
Susman v. Lincoln American Corp., 587 F.2d 866 (7th Cir. 1978), cert. denied, 445 U.S. 942 (1980) 16
Teamsters v. United States, 431 U.S. 324 (1977).. 11
United Air Lines, Inc. v. McDonald, 432 U.S. 385 (1977) 3n, 14, 18
Zipes v. Trans World Airlines, Inc., —— U.S. ——, 102 S. Ct. 1127 (1982) 20

Statutes:

Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ..... *passim*
§ 706(f)(3), Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(3) 20

TABLE OF AUTHORITIES—Continued

Rules: Page

F.R. Civ. P. 19(a)(2)(i) 12
F.R. Civ. P. 23 ..... 8, 11
F.R. Civ. P. 23(a) 3n
F.R. Civ. P. 23(b)(2) 2
F.R. Civ. P. 23(b)(3) 4
F.R. Civ. P. 24(a)(2) 12
F.R. Civ. P. 24(b) 5n, 9n, 12
F.R. Civ. P. 24(b)(2) 13

Other Authorities:

Advisory Committee Notes to Federal Rules of Civil Procedure, 39 F.R.D. 69 (1966) 12
Developments in the Law: Class Actions, 89 Harv. L. Rev. 1318 (1976) 17
Memorandum by Defendant Crown, Cork And Seal Company, Inc. in Opposition to Plaintiff's Motion to Consolidate, Parker v. Crown, Cork & Seal Company, Civ. No. M-80-2839 (D. Md. filed Jan. 9, 1981) 12, 13
Note, Class Actions & Statutes of Limitations, 48 U. Chi. L. Rev. 106 (1981) 17, 19n
Note, Class Actions—Tolling of Statutes of Limitations—Adequate Representation—Haas v. Pittsburgh Nat'l Bank, 17 B.C. Indus. & Com. L. Rev. 915 (1976) 17, 18n

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Respondent Theodore Parker, a black male, was discharged by petitioner Crown, Cork & Seal Company, Inc. (hereinafter "Crown") on July 15, 1977. On October 3, 1977, he filed a timely charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging racially motivated harassment and discharge. While that charge was pending before the

Commission, on September 18, 1978 two other black employees who also had been discharged by Crown, Pendleton and Allen, filed a Title VII action in the United States District Court for the District of Maryland on their own behalf and on behalf of all similarly situated black persons. (*Pendleton v. Crown, Cork & Seal Company*, Civ. No. M-78-1734 (D. Md.).) Their complaint specifically included an allegation that Crown discriminated against blacks as a class with regard to, *inter alia*, terminations, job assignments, and promotions.

On November 9, 1978 the EEOC disposed of Parker's charge. It made a finding of no probable cause and sent Parker a Notice of Right to Sue. Parker consulted and retained the same attorney who was representing Pendleton and Allen in the putative class action filed the previous month but did not immediately file suit against Crown.

On May 31, 1979 the *Pendleton* plaintiffs moved, pursuant to F.R. Civ. P. 23(b)(2), to certify a class consisting of all black persons subjected to racially discriminatory practices by Crown on or after March 31, 1973. This motion was denied and reconsideration also denied by the district court on September 4, 1980, on various grounds,[1] includ-

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[1] The district court found, *inter alia*, that:

(1) Plaintiff Pendleton could not represent all black employees, because he was a probationary employee and therefore an inadequate class representative (Pet. Br. App. 9a);

(2) Plaintiff Allen was an inadequate class representative, because he had never filed a complaint of discriminatory discharge with the EEOC. (Although Allen had filed a charge with the Maryland Commission on Human Rights complaining of Crown's discriminatory termination policies, this occurred before Allen himself was actually discharged by Crown, and the district court ruled that Allen's subsequent submission of an affidavit which mentioned termination to the EEOC after his charge had been referred to the federal agency by the Maryland Commission on Human Rights could

ing inadequate class representation, lack of numerosity and lack of typicality.[2]

On October 27, 1980 (less than 90 days after the denial of class certification in the *Pendleton* case), Parker filed this individual Title VII action and on January 6, 1981 moved to consolidate the case with the *Pendleton* proceedings. Crown opposed consolidation.[3] On March 27, 1981 Crown moved for summary judgment in Parker's case on the theory that the lawsuit was untimely, inasmuch as nearly two years had passed since the EEOC sent Parker a 90-day notice of his right to bring suit. Crown admitted that the pendency of the putative *Pendleton*

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not be construed as an amendment of the original charge) (Pet. Br. App. 14a-15a);

(3) The court could not certify a class of employees who had allegedly been racially harassed by Crown because of plaintiffs' failure to demonstrate that this class was so numerous that joinder was impracticable (Pet. Br. App. 17a).

None of these conclusions are involved in the present controversy before this Court.

[2] F.R. Civ. P. 23(a) states as follows:

> *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

[3] The individual claims of Pendleton and Allen were ultimately settled and on February 26, 1981 a stipulated order of dismissal with prejudice was issued by the district court in *Pendleton*. Thereafter, Parker sought and was granted leave to intervene in the *Pendleton* suit for the purpose of appealing the denial of class certification (Pet. Br. App. 18a-20a; *see United Air Lines, Inc. v. McDonald*, 432 U.S. 385 (1977)) but his appeal to the Fourth Circuit was dismissed on July 17, 1981 as untimely (J.A. 2A).

class action tolled the running of the time limits within which Parker (a member of the putative class) could have *intervened* in *Pendleton*, until final denial of class certification on September 4, 1980. Nevertheless, it maintained, the tolling principle did not apply to the institution of a separate Title VII action by Parker within 90 days of the ruling against certification in *Pendleton*.[4]

The district court agreed and granted Crown's motion for summary judgment. It recognized that in *American Pipe & Construction Company v. Utah*, 414 U.S. 538 (1974), this Court applied equitable principles of "tolling" to allow intervention by a putative class member after denial of certification in the putative class action, and long after the applicable statue of limitations would otherwise have run. However, the district court limited *American Pipe* to its facts and refused to apply the same tolling principles where the putative class member files a separate action, rather than intervening.

On Parker's appeal, the Fourth Circuit reversed. 677 F.2d 391. The Court of Appeals believed that the rationale of *American Pipe* is not limited to intervention. It noted the suggestion in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974) (a decision requiring individual notice to all class members prior to certification in in an F.R. Civ. P. 23(b)(3) case) that the statute of limitations would be tolled in accord with *American Pipe* for all class members who desired to opt out of the class action. The court below also reasoned that the purpose of a statute of limitations, to put a defendant on notice

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[4] Crown relied on two Second Circuit decisions adopting this narrow view of this Court's decision in *American Pipe & Const. Co. v. Utah*, 414 U.S. 538 (1974). *See Arneil v. Ramsey*, 550 F.2d 774, 782-83 (2d Cir. 1977); *Stull v. Bayard*, 561 F.2d 429, 433 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978), discussed *infra* at pp. 14-16.

of a claim with reasonable promptness, is fulfilled where an individual plaintiff's complaint is within the scope of a putative class action, since the defendant will have sufficient information within the statutory period concerning the nature and scope of prospective litigation. The Court of Appeals further observed that intervention may often be denied in the discretion of the district court[5] and for this reason, limiting *American Pipe* only to intervention might produce the inequitable result of allowing some putative members of the class to obtain an adjudication of their claims while excluding others who seek adjudication at the same time. For these reasons, the Court of Appeals concluded that the statute of limitations is tolled for the purposes either of intervention or of filing a new suit based upon a cause of action embraced within a putative class action.

SUMMARY OF ARGUMENT

The equitable tolling principles applied by this Court in *American Pipe* govern this case, even though the individual member of the putative class filed a separate suit after denial of class certification rather than seeking to intervene in the original litigation. For a variety of reasons, wholly unrelated to the matter of tolling, intervention may be unavailable, inappropriate or undesirable to protect the rights of the class member whose individual claim accrues during the pendency of a putative class suit. Hence, if class members are limited to intervention in the original case in order to obtain the benefits of tolling, the *American Pipe* doctrine will fail to achieve its purpose of discouraging premature interventions or filings of separate suits before the resolution of the certification issue in the putative class action.

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[5] *See* F.R. Civ. P. 24(b).

The facts of this case demonstrate the wisdom of permitting an individual suit by a class member after denial of certification. It was completely proper for Parker to rely upon the *Pendleton* suit plaintiffs to protect his rights as a class member until the ruling against certification. Thereafter, the company opposed consolidation of this case with *Pendleton* on grounds which it could also have raised in opposition to any attempt by Parker to intervene. Unless the attorney for an individual claimant who is also a member of a putative plaintiff class knows that he will be able to protect his client's rights by filing a separate suit after certification is denied or withdrawn, instead of having to rely upon discretionary intervention, he will be compelled to prosecute a separate case as soon as the claim accrues, thus vitiating the *American Pipe* rule and eliminating the class action advantages of judicial economy and efficiency.

Tolling the statute of limitations whether the individual class member seeks to intervene or to file a separate suit after denial of certification is not inconsistent with the purposes of limitations periods. There is no dispute in this case, and the trial court explicitly found, that Parker was a member of the putative class on whose behalf the *Pendleton* litigation was brought. Therefore, the defendant had ample and timely notice when *Pendleton* was initiated of the substantive claims being raised and of "the number and generic identities of the potential plaintiffs [including Theodore Parker] who may participate in the judgment," *American Pipe*, 414 U.S. at 554. The purpose of the limitations period was satisfied.

Finally, Crown's remaining claims, that tolling is unavailable in the absence of explicit statutory authorization, and that the 90-day period for filing suit under Title VII is a "jurisdictional prerequisite" rather than a statute of limitations, are without merit.

ARGUMENT

THE PENDENCY OF A PUTATIVE CLASS ACTION TOLLS THE RUNNING OF THE STATUTE OF LIMITATIONS FOR INDIVIDUAL CLAIMS OF MEMBERS OF THE PUTATIVE CLASS FROM THE TIME THE ACTION IS COMMENCED UNTIL DENIAL OF CLASS CERTIFICATION

Introduction

In this case the Court must decide whether respondent Parker has lost the opportunity to redress his claims of unlawful employment discrimination by petitioner Crown because of a procedural abyss created by the decision in *American Pipe & Construction Company v. Utah*, 414 U.S. 538 (1974). No language in *American Pipe* explicitly limits the equitable tolling doctrine which the Court there enunciated to cases in which intervention is sought after denial of class certification or announces that tolling is unavailable when a separate action is commenced following the refusal to certify. That differing results have been reached by Courts of Appeals emphasizes the reasonableness of Parker's belief that *American Pipe* tolling principles apply to new suits as well as interventions. Yet, if Crown is correct, the *American Pipe* decision (intended to facilitate efficient litigation and to protect class members from loss of their claims) set a procedural trap which will serve, in this and other cases, to defeat potentially meritorious claims.

That result would be particularly ironic in this case. Crown concedes that under *American Pipe*, Parker could have waited until after class certification was denied in the *Pendleton* case before intervening but argues that the same principle does not apply to Parker's decision to commence a separate Title VII action. Yet Crown *opposed* consolidation of Parker's claims with those of Pendleton and Allen in the same action (a step which would have shaped a lawsuit identical to that which the

company would have had to defend if Parker had intervened).

As we show below, the rationale of *American Pipe* is fully applicable to the filing of a separate action by a class member. Moreover, application of equitable tolling principles to allow the institution of separate suits, as well as intervention, by putative class members following the denial of certification in cases brought as class actions is fully consonant with the important purposes underlying statutes of limitations.

A. The Decision Below Correctly Construes And Applies This Court's Ruling In *American Pipe*

1. *The basis for* American Pipe

In *American Pipe*, 414 U.S. at 554, this Court said:

> [T]he rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action. [footnote omitted]

As the court below ruled, the rationale underlying *American Pipe* applies with full force to the bringing of an individual action by a member of the putative class who could properly believe that he was covered by the action in which class certification was ultimately denied.

The purpose of tolling the statute of limitations in *American Pipe* was to discourage premature interventions by putative class members which would remove the advantages of judicial economy and efficiency that are available in class litigation under F.R. Civ. P. 23. If the statute of limitations were not tolled while the motion for class certification were pending, members of the class would be obliged, in order to protect their individual rights, either to file separate lawsuits or to seek to intervene in the putative class action, thus unnecessarily bur-

dening the courts. Thus, tolling the limitations period during the pendency of the class action is designed to encourage class members to delay pursuing their claims for redress until the motion for certification has been acted upon.

2. *Scope of the* American Pipe *rule*

With this purpose in mind, it makes little sense to view the availability of tolling as limited to post-certification-denial intervention only. Wholly apart from considerations of tolling, a member of a putative plaintiff class, whose individual claim has accrued, has at least two options to obtain judicial relief: intervention and the filing of a separate suit. Any number of factors may make intervention the less desirable course. For example, the number of parties already in the suit may be so large that further joinder would make it unmanageable.[6] Discovery schedules may already have been established which would be difficult for the proposed intervenor to meet. The putative class action may be regional or nationwide in scope and have been filed in a jurisdiction far from the residence or workplace of the proposed intervenor.[7] Finally, intervention may be available only at the discretion of the trial court and may be denied on grounds unrelated to the merits of the proposed intervenor's claim.[8]

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[6] Especially in the case of a large company against which a Title VII putative class action has been brought, the number of individual employees or applicants who could seek intervention or file separate suits is likely to be substantial.

[7] For example, a Title VII suit might challenge the hiring or promotion practices of a large corporation with plants or facilities throughout the nation. In other types of class suits, the possibility of concentrating many separable suits in one jurisdiction could be even greater.

[8] *See* F.R. Civ. P. 24(b).

For all of these reasons, the filing of separate litigation by a class member is at least as likely, and often more likely, than attempted intervention. Yet, if the tolling rule of *American Pipe* is to be limited to intervention, as Crown contends, it will have little efficacy. Counsel for putative class members will be on notice (as they are not presently on notice from the *American Pipe* opinion) that if they take advantage of the tolling rule during the pendency of the class action, they may be unable fully to protect their clients' rights, should certification be denied, because they will be limited to seeking intervention in the former class lawsuit, no matter what its procedural posture, no matter how inconvenient the forum in which it is pending, etc. Obviously, there will be no incentive to employ the *American Pipe* option and the federal courts will be burdened with a multiplicity of suits.

This result is especially likely because there may be no way for counsel representing an individual member of a putative class to predict, at the time his client's claim accrues, what the relative advantages and disadvantages of intervention may be, many months later (after disposition of the certification question). At that point in time, however, the remaining individual claims in the suit may be sufficiently different from those of the proposed intervenor that, had he been a party to the suit from its inception a court might properly have ordered a severance of his claim. In such a case, of course, there is no reason why disparate claims should be tied together by an "intervention only" reading of *American Pipe*.

3. *Application of* American Pipe to this case

The facts of this case demonstrate why the *American Pipe* decision should be construed to toll the statute of limitations and permit a putative class member to bring an individual suit once class certification has been denied. At the time Parker's cause of action accrued, *i.e.*, when he

received the notice of right to sue, the *Pendleton* class action had already been started. Parker could reasonably believe that his rights would be fully protected by that action, since the allegations in *Pendleton* specifically covered his complaint of harassment and discharge because of his race. (Pet. Br. App. 2a-4a.) An individual action by Parker at that time would have involved a tremendous duplication of effort. Evidence of bias against the class as a whole would have been relevant to his individual claim, and thus broad discovery would have been involved in both cases. *See Teamsters v. United States*, 431 U.S. 324, 361-62 (1977).

There was also no need for Parker to intervene in the class action because of any dissatisfaction with the representation of the putative class by the named plaintiffs. In this case, as it happens, Parker and the named plaintiffs had the same attorney, so that intervention prior to denial of class certification would not have added new counsel to the case. Normally, however, intervention by all the various members of a class who have individual claims would involve unnecessary participation by a number of lawyers with all the possibilities of time-consuming differences that often attend multiple representation in the same case. It was therefore proper and efficient, and in accordance with the purposes of Rule 23, for Parker to rely on the class action while it was pending.

After class certification was denied, Parker filed this lawsuit, rather than following the exact procedural route (intervention) used in *American Pipe*. However, this difference is of no significance since Parker then moved to consolidate this suit with what remained of the putative class action brought by Pendleton and Allen. Thus, the considerations of judicial efficiency and fairness—litigation of all of the discrimination claims against Crown at the same time and in the same court—which led this Court to announce the tolling rule in *American Pipe*, would be realized by permitting Parker's action to

continue. On its facts, therefore, there is no viable distinction between this case and *American Pipe* which could justify the district court's refusal to apply the tolling principle of that decision.

Moreover, Crown's opposition to consolidation of the *Parker* and *Pendleton* cases indicates the defect inherent in a reading of *American Pipe* which limits the tolling doctrine to intervention. Intervention by a member of the putative class into a suit still pending as classwide litigation may qualify as intervention "of right" under F.R. Civ. P. 24(a)(2). *See* Advisory Committee Notes, 39 F.R.D. 69, 110 (1966) [Rule 24(a)(2) incorporates standards of Rule 19(a)(2)(i)]. However, once class certification has been denied, the only possible basis for intervention by a member of the class that had been proposed for certification would be F.R. Civ. P. 24(b). Such intervention is permissive and may be denied in the discretion of the court.

As Crown's opposition to the motion to consolidate the *Parker* and *Pendleton* cases indicates, the basis for denying intervention may have nothing to do with the claims of the individual seeking to enter the case. Crown's first ground for objecting to consolidation was that, because of its earlier filing and active discovery the *Pendleton* suit was in a different procedural posture from Parker's. Memorandum by Defendant Crown, Cork And Seal Company, Inc., in Opposition to Plaintiff's Motion to Consolidate, *Parker v. Crown, Cork & Seal Company*, Civ. No. M-80-2839 (D. Md. filed Jan. 9, 1981), at 1-3 [hereinafter cited as "Crown Consolidation Memo"]. Of course, this will always be the case where an individual claimant intervenes following *American Pipe* tolling. Since delay in adjudication is explicitly identified as a ground for denying permissive intervention, F.R. Civ. P. 24(b), to require a member of the putative class to proceed only by way of intervention following denial of class certification could result in extinguishing the very claim whose preser-

vation it is the object of the *American Pipe* tolling rule to secure.

Crown's second ground for opposing consolidation was that there were not "common issues of fact" in the two cases because "Parker's termination involved entirely different facts, circumstances and witnesses, different supervisory employees, different work rules, a different department and a different employment history than those involved in the terminations of Pendleton and Allen." Crown Consolidation Memo, at 3. Again, this sort of argument will be available, almost by definition, to an employer resisting a motion for intervention by a putative class member following *American Pipe* tolling. Since the existence of a common question of law or fact is a prerequisite for intervention, *see* F.R. Civ. P. 24(b)(2), the difficulty created by limiting *American Pipe* to post-certification-denial intervention is at once apparent.

4. *The language and cases on which Crown relies*

Crown relies on this language in the *American Pipe* opinion:

> [A]t least where class action status has been denied solely because of failure to demonstrate that "the class is so numerous that joinder of all members is impracticable," the commencement of the original class suit tolls the running of the statute of limitations for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status.

414 U.S. at 552-53. The holding in that case was, of course, no broader than required to decide the matter before the Court. In *American Pipe*, class certification had been denied by the district court on the sole ground that the class was not so numerous as to make joinder impracticable—the court finding that all other prerequisites for class action status had been satisfied. Local jurisdictions originally covered by the class definition in

Utah's complaint then sought to intervene as parties plaintiff in Utah's action, but intervention was denied on the ground that the statute of limitations had run. Under these circumstances, this Court's holding was that intervention should have been granted in the case before it because the running of the statute was tolled during the period prior to denial of class certification.

Crown apparently would read the Court's language as defining the outer limits of the equitable tolling principle which it was applying, although it can point to nothing in the opinion itself which so states. As we have earlier explained, the *reasoning* which led the Court to apply tolling pending the determination of a motion for class certification applies not only to intervention, but also—and with equal force—to the commencement of a separate action. The Court itself intimated this in the *dictum* in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974):

> Petitioner also argues that class members will not opt out because the statute of limitations has long since run out on the claims of all class members other than petitioner. This contention is disposed of by our recent decision in *American Pipe & Construction Co. v. Utah* [citation omitted], which established that commencement of a class action tolls the applicable statute of limitations as to all members of the class.

(Since class members would not opt out of a class action only to seek to intervene into it again, this statement must mean that a putative class member can opt out and bring his own suit within the time remaining under the applicable statute of limitations.) *See also United Air Lines, Inc. v. McDonald*, 432 U.S. 385, 402 (1977) (Powell, J., dissenting).

The lower court opinions on which Crown also relies likewise fail to analyze *American Pipe's* rationale and instead reflexively apply the language describing the Court's holding. In *Arneil v. Ramsey*, 550 F.2d 774, 782-83 (2d

Cir. 1977), plaintiffs sought the benefit of the tolling principle during the entire pendency of a class action even though the putative class did not include them for nearly two years after the suit was filed, when an attempt was made to expand the class by filing an amended complaint. Unless the amended complaint "related back" to the initiation of the case for tolling purposes, the claims in question were barred by a three-year statute of limitations. *See* 550 F.2d at 779. The Second Circuit refused to extend the tolling principle in this fashion, noting that it "would not accord with one of the rationales of *American Pipe*, that commencement of the class action adequately notifies the defendants" of the number and generic identities of the potential plaintiffs. *Id.* at 782. The Second Circuit went on, in *dictum*, to use the language on which Crown relies (*see* Pet. Br. 8):

> Of especial significance is the fact that the rule of *American Pipe* was intended for the benefit of purported members of the class who sought to *intervene* in the action after class status was denied.

However, in the same paragraph, the panel made it clear that this was not the basis for its judgment:

> To suspend the statute in this case, however, would result in the maintenance of another suit by plaintiffs who took no action [*i.e.*, neither intervention nor commencement of litigation] for almost five years after they were aware of information sufficient to put them on notice of possible fraud by the defendant.

Id. at 783 (footnote omitted).

In *Stull v. Bayard*, 561 F.2d 429, 433 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978), also cited by Crown, the panel rejected an *American Pipe* tolling claim in one short paragraph which merely quoted the dictum of *Arneil v. Ramsey* and described the claim as "completely without merit." There was no analysis of the purposes of the equitable tolling doctrine or consideration of circumstances which might have led a court of equity to decline to apply the doctrine. (For example, the putative class

action which was the claimed basis for tolling the statute of limitations in *Stull* was an action filed by the appellant on behalf of his wife against the same defendant "on a complaint almost identical to" that before the court. 561 F.2d at 433.)

Finally, in *Pavlak v. Church*, 681 F.2d 617 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3320 (No. 82-650, Oct. 12, 1982), a divided panel declined to apply *American Pipe* tolling to allow a separate suit after denial of class certification because, it said, policies of judicial efficiency and economy would not be furthered. The majority rejected the appellant's argument that proceeding by way of intervention would be cumbersome since there was "an unchallenged factual finding that the class was not numerous. . . . The *American Pipe* rule, therefore, does not support appellant's argument that she should be authorized to commence an independent suit without regard to limitations where class action status has been denied and no intervention is sought." 681 F.2d at 620. The panel majority neither considered other potential problems for a would-be intervenor (*see* pp. 9-10 *supra*) nor evaluated the tolling claim with the same depth as the court below, *see* 677 F.2d at 393-94.

On the other hand, a number of Courts of Appeals—while not directly deciding the question whether the *American Pipe* tolling doctrine should be limited to intervention—have, in construing that decision in other contexts, enunciated the tolling principle in terms which would obviously cover the institution of separate actions. *E.g.*, *In re Fine Paper Litigation*, 632 F.2d 1081, 1085, 1087 (3d Cir. 1980); *Susman v. Lincoln American Corp.*, 587 F.2d 866, 869 (7th Cir. 1978), *cert. denied*, 445 U.S. 942 (1980); *Jiminez v. Weinberger*, 523 F.2d 689, 696 (7th Cir. 1975) (Stevens, J.), *cert. denied*, 427 U.S. 912 (1976); *Haas v. Pittsburgh National Bank*, 526 F.2d 1083, 1096-98 (3d Cir. 1975); *cf. Satterwhite v. City of Greenville*, 578 F.2d 987, 997 (5th Cir. 1978) (pretermitting question), *vacated on other grounds*, 445 U.S. 940

(1980). Many commentators have also rejected a narrow interpretation of *American Pipe* in light of its underlying rationale. *E.g., Developments in the Law: Class Actions*, 89 Harv. L. Rev. 1318, 1448 (1976); Note, *Class Actions & Statutes of Limitations*, 48 U. Chi. L. Rev. 106 (1981); Note, *Class Actions—Tolling of Statutes of Limitation—Adequate Representation—Haas v. Pittsburgh National Bank*, 17 B.C. Indus. & Com. L. Rev. 915, 919 (1976).

In sum, if *American Pipe* is read narrowly, either to limit its holding to situations where class certification is denied only on the ground of lack of numerosity or where intervention after denial of certification is sought, many potential class members will undoubtedly feel obliged to commence their own suits while class certification is pending if there is a danger that otherwise they will be barred by a statute of limitations. This would be contrary to the underlying rationale of the *American Pipe* decision, to promote judicial efficiency and economy. To say that Parker could have intervened in the *Pendleton* suit after denial of class certification but could not, within the same time limits, bring his own action, is truly, as the court below stated, to exalt form above substance.[9]

B. Tolling The Statute Of Limitations In This Case Is Consistent With The Purposes Of Limitations Periods

Crown argues that the application of *American Pipe* tolling principles to sustain the filing of separate Title VII actions following denial of class certification will "[u]ndermine the [p]urpose and [e]ffect of [s]tatues of [l]imitation" (Pet. Br. at 21). This contention is completely without merit, especially in light of the company's concession that Parker could probably have *intervened* in the *Pendleton* case after denial of class certification. Un-

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[9] Parker's motion for intervention after class certification was denied has no relevancy to the issue in this case. It was solely for the purpose of taking an appeal from the denial of class certification, an issue not here presented. *See* note 3 *supra*.

less action other than intervention would present issues that were not raised by the original class filing, or otherwise seriously inconvenience or prejudice the defendant, there is no reason why the statute of limitations should not toll for putative class members using a procedure other than intervention.[10]

Statutory limitations periods are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared." *American Pipe*, 414 U.S. at 554, quoting *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944). As *American Pipe* holds, in the context of class actions the policy of ensuring essential fairness to defendants is satisfied where a class suit "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." Thus, within the limitations period, "defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation . . . ." 414 U.S. at 555. *See United Air Lines, Inc. v. McDonald*, 432 U.S. at 392-93, where this Court stated that "the lawsuit had been commenced by the timely filing of a complaint for class-wide relief, providing United with the essential information necessary to determine both the subject matter and size of the prospective litigation."

Certainly in the instant case Crown had ample notice of Parker's individual claims. The allegations of racially motivated harassment and termination were included in the class complaint. Parker was also identified as one of the putative class members (*cf.* Pet. Br. App. 19a). In addition, Parker had filed a timely charge with the

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[10] *See* Note, *Class Actions—Tolling of Statutes of Limitations—Adequate Representation—Haas v. Pittsburgh Nat'l Bank*, 17 B.C. Indus. & Com. L. Rev. 915, 922 (1976).

EEOC, thereby giving Crown notice of his claims. Crown concedes that it had sufficient notice to defend against Parker's allegations if Parker had intervened in the *Pendleton* case rather than brought his individual cause of action. Since the instant action will involve the same evidence, witnesses and memories that would have been involved if Parker had intervened, it is difficult, if not impossible, to understand why notice would be sufficient for him to intervene, but not sufficient to bring an individual action.

While in *American Pipe*, the lower court had determined that the named plaintiffs' claims were typical of those of the putative class members, this Court did not require typicality as a prerequisite to tolling; nor have most lower courts. What is required is that the defendant receive the essential information necessary to determine both the subject matter and size of the prospective litigation. *McCarthy v. Kleindienst*, 562 F.2d 1269, 1274 (D.C. Cir. 1977). Although a typicality finding is one factor indicating that the defendant has received adequate notice of the potential claims against him, the court can also determine whether the defendant has received fair notice by comparing the allegations of the class complaint with those of the motion to intervene (*id.*), or the complaint in an individual action.[11]

Because Crown cannot seriously argue that it was unaware of Parker's individual claims during the time that *Pendleton* was proceeding as a putative class action on behalf of black employees allegedly subjected to racially

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[11] One commentator has suggested that in many of these cases the question of notice to the defendant may not have been presented by the defendant or it may have been obviated because it was clear to all that the defendant must have received notice. Indeed in most cases it will be obvious that the defendant received notice from the filing of the class suit that class members would have claims. Note, *Class Actions & Statutes of Limitations*, 48 U. Chi. L. Rev. 106, 110 n.22 (1981).

based harassment and termination, application of equitable tolling principles in this case results in no unfairness to the employer nor inconsistency with the purposes of the 90-day suit requirement of Title VII.[12]

Finally, there is also no merit in petitioner's argument that the ninety-day period for bringing suit under Title VII should be construed as a jurisdictional prerequisite rather than as a statute of limitations (Pet. Br. 24-29). It is no more jurisdictional than the statute involved in *American Pipe*. Indeed, it is no more, but rather less, jurisdictional than the time for filing administrative charges which this Court in *Zipes v. Trans World Airlines, Inc.*, —— U.S. ——, 102 S. Ct. 1127 (1982), held not to be jurisdictional. The charge marks the first official notice to the employer of the claims against him, whereas the filing of suit notifies the employer that the plaintiff intends to pursue the charge in court. The jurisdiction of the court is conferred by Section 706(f)(3), giving district courts power to determine the cause of action; the ninety-day period is purely one of limitation on the time for bringing suit. The statute is thus subject to the tolling principles announced in *American Pipe*.

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[12] Crown's suggestion that the federal courts cannot apply equitable tolling principles in Title VII cases because "the language of Section 2000e-5 does not provide any exception to, or provision for, the tolling of that ninety-day period" (Pet. Br. at 21) finds no support in *American Pipe*, where this Court's determination to apply tolling principles did not rest upon any reference to the quite different tolling provision in the Clayton Act. *Compare* 414 U.S. at 541-42 & nn.2, 3 *with id.* at 545-56. The argument is very similar to one made in *American Pipe*, to the effect that the courts were without power to apply equitable tolling because the statute of limitations was a "substantive" right under the statute. The Court rejected that contention, emphasizing that "[t]he proper test is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme." *Id.* at 558 (footnote omitted). *See* text *infra*.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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